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'Reforming' Foreign Intelligence

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Periods of sin and excess are commonly followed by spasms of remorse and moralistic overreaction. That is harmless enough; indeed, the repentance of the hungover reveller is standard comic fare. In Washington, however, politicians are apt to repent only the sins of others, and matters become rather less humorous when the moral hangover is written into laws that promise permanent damage to constitutional procedures and institutions.

As expiation for Vietnam, we have the War Powers Resolution, an attempt by Congress to share in detailed decisions about the deployment of U.S. armed forces in the world. It is probably unconstitutional and certainly unworkable. But politically the resolution severely handicaps the President in responding to rapidly developing threats to our national interests abroad. We have, as atonement for illegalities in fund raising for the 1972 campaign, the Federal Election Campaign Act, which limits political expression and deforms the political process. The Supreme Court held that parts of this act violate the First Amendment and probably should have held that all of it does.

Now, in response to past excesses by our intelligence agencies, we have H. R. 7308, the proposed Foreign Intelligence Surveillance Act. (A similar bill is out of committee in the Senate.) Like the other two "reforms" it reflects an unwillingness to recognize that existing processes worked and do not require reform, as well as a certain lightheadedness about the damage the reform will do to indispensable constitutional institutions.

The purpose of H. R. 7308 is to lodge in the federal courts the final power to decide when electronic surveillance of American citizens and lawfully admitted aliens may be done to gather foreign intelligence information important to national security.

Since Franklin Roosevelt at least, every President has claimed the constitutional authority to order such surveillances without a court order. That power has been derived from the President's role under Article II of the Constitution as commander-in-chief and officer primarily responsible for the conduct of foreign affairs. The judicial warrant requirement of the Fourth Amendment, never an absolute in any case, was thought inapplicable because of the fundamental dissimilarity of intelligence gathering and criminal investigation with prosecution in mind.

A Lot of Secrecy

H. R. 7308 provides that the Chief Justice of the United States will publicly designate at least one judge from each of the 11 federal circuits to sit on a special court. Two judges at a time will come to Washington. Warrant applications may be made to either. The Chief Justice will publicly designate six other judges to sit in panels of three to hear government appeals from warrant denials. The government may petition for review by the Supreme Court if turned down by the special court of appeals. All hearings, including presentations to the Supreme Court, will be secret; the rulings will be secret; and the government will be the only party represented.

Each application requires the approval of the Attorney General or his designee and a certification by a high presidential appointee working in the area of national security or defense. Persons to be targeted for surveillance, the means to be used, minimization of the surveillance and close control of the information obtained are provided for.

The most stringent protections are provided for targeting American citizens and aliens lawfully admitted for permanent residence. There must be probable cause to believe they are agents of a foreign power. The bill may also require reason to believe that a crime may be committed.

Much of this tracks existing Executive Branch practice. The political appeal of the bill lies in the introduction of judges and warrants. That is also its major flaw. Procedures appropriate to criminal contexts, where, say, a wiretap is sought to gather evidence to prosecute narcotics smugglers, are not easily transferred to foreign intelligence, where, for example, radio transmissions from hostile powers' establishments in the country are to be monitored with no thought of prosecution.

The difference in context may mean, for one thing, that the law would be unconstitutional. If warrantless surveillance for foreign intelligence is a presidential power under Article II (the only two courts of appeals required to decide the issue held that it is, but the point is unsettled), Congress probably has no authority to require warrants.

Moreover, the attempt to give the Supreme Court an essentially administrative role in intelligence gathering may run afoul of Article III of the Constitution. It is somewhat as if Judge Webster was empowered to run the FBI while remaining on the bench. The job is managerial, not judicial, and the two should not be mixed.

There are and can be no judicial criteria for making decisions about the needs of foreign intelligence, and judges cannot become adequately informed about intelligence to make the sophisticated judgments required. To do an adequate job, they would have to be drawn fully into intelligence work, which is not the point of this enterprise. To suppose that they would defer to the superior expertise of the agencies is either to confess the safeguards will not work or to underestimate the strength of the tendency displayed by the judiciary in recent years to take over both legislative and executive functions.

The requirement that a crime be in the offing would eliminate our ability to learn of foreign intelligence activities vital to our national interests but which violate no federal criminal law.

The law would almost certainly increase unauthorized disclosures of sensitive information simply by greatly widening the circle of people with access to it. In some cases as many as thirteen judges, their clerks, and secretaries would share knowledge. If opinions — required only when warrants are denied—are circulated, or if the judges consult one another, a minimum of 26 judges will have top-secret information. Disclosures are not merely intelligence calamities; they may lead to foreign relations debacles as well. Electronic surveillance is known by everyone to exist, but its public disclosure may be hard to ignore, just as Khrushchev could ignore the U-2, until it was shot down.

The element of judicial secrecy is particularly troubling. Because it reverses our entire tradition, it is difficult to think of se-

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cret decisions as "law." The assertion that this bill would ensure that foreign intelligence electronic surveillance was conducted according to "the rule of law" is, therefore, misleading. The bill pretends to create a real set of courts that will bring "law" to an area of discretion. In reality, it would set apart a group of judges who must operate largely in the dark and create rules known only to themselves. Whatever that may be called, it debases an important idea to term it the rule of law; it is more like the uninformed, unknown and uncontrolled exercise of discretion.

The statute would, moreover, present some judges with an impossible dilemma. Suppose that the Supreme Court splits, say five-to-four, in granting a warrant. If the dissenting Justices felt that the decision and others it presages deny basic constitutional rights of Americans, what are those Justices to do? Must they remain stoically silent about what they believe to be the secret destruction of rights they are sworn to uphold? Should they publish a full opinion and damage national security? Or should they perhaps state publicly that constitutional freedoms are being destroyed but they are not at the moment at liberty to explain how? They appear to have a choice between behavior that is dishonorable or fatuous. That is an intolerable moral and constitutional position in which to place judges.

Diminishing Executive Responsibility

The law seems certain as well to diminish substantially the responsibility and accountability of the Executive Branch. To take the extreme but not improbable case, if even one judge proves excessively lenient, the government can go to him in all doubtful, or even improper, cases. Since there is no adverse party to appeal, the "rule of law" will be the temper of one district judge, unknown to the other judges and the Supreme Court.

Whether or not there is such a judge, what can the Congress do if it comes to think the surveillance power granted has been abused? Can a congressional committee summon before it for explanation the judges, perhaps including some members of the Supreme Court, who approved the warrants? I should think certainly not. Can we expect successful criminal or civil actions against the officials who, following statutory procedures, obtained warrants from the judges? That seems hardly likely.

When an attorney general must decide for himself, without the shield of a warrant, whether to authorize surveillance, and must accept the consequences if things go wrong, there is likely to be more care taken. The statute, however, has the effect of immunizing everyone, and sooner or later that fact will be taken advantage of. It would not be the first time a regulatory scheme turned out to benefit the regulated rather than the public.

The intelligence abuses of the past were uncovered through existing processes of investigation. One response was the detailed regulations governing electronic surveillance promulgated by then Attorney General Edward Levi. These are fully as sensitive to Fourth Amendment protections against unreasonable searches and seizures of communications as this bill is, and likely to be as effective. The intelligence officer reckless enough to ignore those regulations and subject himself to criminal liability would be reckless enough to bypass the warrant requirement of the proposed statute as well.

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